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Attorneys for Plaintiff
James R. Glidewell Dental Ceramics, Inc.
d/b/a Glidewell Laboratories

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JAMES R. GLIDEWELL DENTAL
CERAMICS, INC. dba GLIDEWELL
LABORATORIES, a California
corporation,

Plaintiff,

vs.

KEATING DENTAL ARTS, INC.,

Defendant.

AND RELATED COUNTERCLAIMS.

| Case No. SACV11-01309-DOC(ANx)

**JAMES R. GLIDEWELL DENTAL
CERAMICS, INC.'S NOTICE OF
MOTION AND MOTION IN LIMINE
#5 TO EXCLUDE EVIDENCE OF
CERTAIN TRADEMARK OFFICE
PROCEEDINGS; MEMORANDUM
OF POINTS AND AUTHORITIES**

Hearing

Date: January 28, 2013

Time: 8:30 a.m.

Ctrm: 9D, Hon. David O. Carter

Pre-Trial Conf.: January 28, 2013
Jury Trial: February 26, 2013

1 **TO THE DISTRICT COURT AND PARTIES IN INTEREST:**

2 **PLEASE TAKE NOTICE** that, by submission to the Honorable David O.
 3 Carter of the United States District Court for the Central District of California,
 4 Plaintiff James R. Glidewell Dental Ceramics, Inc. (“Glidewell”), hereby moves the
 5 court *in limine* for an order to exclude evidence of, and argument regarding, the
 6 parties’ filings and the U.S. Patent and Trademark Office’s (“PTO”) actions in
 7 Proceeding No. 92056050 and Proceeding No. 91202891, including, but not limited
 8 to (a) Defendant Keating Dental Arts, Inc.’s (“Keating” or “Defendant”) Petition
 9 for Cancellation of Glidewell’s registered BruxZir trademark, (b) Keating’s
 10 Opposition to Glidewell’s application to register the BruxZir mark for dental
 11 ceramics, and (c) the PTO’s suspensions of both proceedings pending the outcome
 12 of the instant action (collectively, “PTO Proceedings”). As detailed in the
 13 accompanying memorandum, the PTO Proceedings, *as evidence*, are irrelevant to
 14 any issues to be tried to the jury. *See* Fed. R. Evid. 401, 402. Even if the PTO
 15 Proceedings had some probative value *as evidence* – which they do not – their
 16 probative value would be “substantially outweighed by a danger of one or more of
 17 the following: unfair prejudice, confusing the issues, misleading the jury, undue
 18 delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid.
 19 403. For this additional reason, the Court should preclude Keating from proffering
 20 to the jury evidence or argument as to the PTO Proceedings.

21 This motion is made following the Local Rule 16-2 Meeting of Counsel
 22 Before Final Pretrial Conference and the discussion of evidentiary matters pursuant
 23 to Local Rule 16-2.6, which took place on December 19, 2012 (in-person meeting)
 24 and Local Rule 7-3 Conference of Counsel Prior to Filing of Motions, which took
 25 place on December 31, 2012 (telephonically) and continued on January 2, 2013
 26 (telephonically). The parties’ counsel discussed the issues presented by this
 27 Motion, but could not reach agreement.

28 This motion is based on this notice of motion and the attached memorandum

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1 of points and authorities, the pleadings and records on file with the Court in this
2 action, and on such other and further argument and evidence as the Court may
3 properly receive.

4 Dated: January 17, 2013

5 SNELL & WILMER L.L.P.

6 By: *s/Greer N. Shaw*

7 Philip J. Graves

8 Greer N. Shaw

9 Deborah S. Mallgrave

10 Attorneys for Plaintiff

11 James R. Glidewell Dental Ceramics, Inc.
12 dba Glidewell Laboratories

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 The Court should exclude from evidence at trial the parties' filings with, and
4 actions taken by, the U.S. Patent and Trademark Office ("PTO") in connection with
5 Glidewell's BruxZir mark. In particular, the Court should exclude Keating's
6 Petition for Cancellation, filed with respect to Glidewell's registered BruxZir mark
7 (registered for certain dental restoration products, such as crowns and bridges). The
8 Court also should exclude evidence of the Opposition that Keating filed in an
9 attempt to prevent Glidewell's registration of the BruxZir mark for a different class
10 of products, dental ceramics. Documentary and testimonial evidence of the Petition
11 for Cancellation and the Opposition, and any attorney argument premised thereon,
12 should be excluded from evidence because they are irrelevant to the parties' claims
13 and defenses at issue in this case. Even if the Petition for Cancellation and the
14 Opposition might be relevant, they should still be excluded because the risk of
15 unfair prejudice and jury confusion substantially outweighs any probative value.

16 Moreover, the Court should exclude evidence of the PTO’s decisions to
17 suspend proceedings on Keating’s Petition for Cancellation and Opposition
18 (collectively, “PTO Proceedings”), pending the outcome of this litigation. These
19 actions, and others in the PTO Proceedings, say nothing about the validity of the
20 BruxZir mark or the merits of Keating’s purported defenses. Exposing the jury to
21 irrelevant evidence of collateral administrative proceedings carries a substantial risk
22 of prejudice and confusion because, among other things, the jury may wrongly
23 conclude that its decision will be second guessed –or corrected if erroneous – by the
24 PTO.

II. STATEMENT OF FACTS

26 On June 17, 2009, Glidewell applied for a registration of its BruxZir mark for
27 dental bridges; dental caps; dental crowns; dental inlays; dental onlays; dental
28 prostheses, and the PTO issued the registration on January 19, 2010. (Dkt. #90-1,

1 Ex. L (Allred Decl., ¶¶ 4-5); Dkt. 90-19, Exs. 59-60)

2 On May 27, 2011, Glidewell applied to register the BruxZir mark for a
 3 different class of products, dental ceramics. (Dkt. #90-19, Ex. 61) Keating filed
 4 Trademark Opposition No. 91202891 on December 7, 2011 to contest Glidewell's
 5 trademark registration application to include dental ceramics in the class of goods
 6 covered by the registered BruxZir mark. On February 3, 2012, the PTO granted
 7 Keating's motion to suspend Opposition No. 91202891 pending final determination
 8 of the instant case.

9 On August 17, 2012, Keating filed a Petition for Cancellation, Proceeding
 10 No. 92056050, with the PTO to cancel Glidewell's registered BruxZir mark. (Dkt.
 11 #58-1, Ex. A) On October 26, 2012, the PTO granted Keating's motion to suspend
 12 the Proceeding No. 92056050 pending the determination of the instant action.

13 Despite their lack of relevancy, Keating has sought to inject the Petition for
 14 Cancellation and the Opposition into this litigation at various stages. In the
 15 Declaration of Rustin Mangum in support of Motion and Motion for an Order to
 16 File Answer, Affirmative Defenses and Second Amended Counterclaims, Keating
 17 proffered its Petition for Cancellation to argue that Glidewell's BruxZir mark is
 18 generic, and that relevant consumers were unlikely to be confused between BruxZir
 19 and Keating's KDZ Bruxer mark. (Dkt. #58 at 2:1-3) Keating also used
 20 Opposition No. 91202891 and the PTO's suspension of those proceedings as an
 21 exhibit in its deposition of Glidewell's General Counsel Keith Allred on October
 22 25, 2012, and has offered the same as Exhibit 128 in the joint exhibit list submitted
 23 by the parties prior to trial. (Dkt. #195)

24 **III. ARGUMENT**

25 **A. Evidence of the PTO Proceedings is Irrelevant.**

26 Glidewell anticipates that Keating may attempt to proffer the Petition for
 27 Cancellation, the Opposition, and other items from the PTO Proceedings as
 28 evidence, and argument premised thereon, at trial. These items are irrelevant and

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1 should be excluded.

2 “Relevant evidence” is “evidence having any tendency to make the existence
3 of any fact that is of consequence to the determination of the action more probable
4 or less probable than it would be without the evidence.” Fed. R. Evid. 401.
5 “Evidence which is not relevant is not admissible.” Fed. R. Evid. 402.

6 Courts have determined, pursuant to FRE 401 and 402, that PTO decisions
7 and pending proceedings are of limited or no relevance to trademark infringement
8 actions. *See, e.g., Desert European Motorcars, Ltd. v. Desert European Motorcars,*
9 *Inc.*, 2011 WL 3809933, at *13-14 (C.D. Cal. Aug. 25, 2011). In *Desert European*,
10 the Court granted Plaintiff’s Motion to Strike Defendant’s phrase in its Answer and
11 Counterclaim regarding its intent to file a petition to cancel Plaintiff’s trademark.
12 In doing so, the Court reasoned that the phrase was “immaterial, as Defendant’s
13 petition to cancel . . . has now been stayed pending the outcome in this present
14 Action.” *Desert European*, 2011 WL 3809933, at *14.

15 In *Coryn Group*, also a trademark infringement case, the Court granted
16 Plaintiff’s motion *in limine* to exclude evidence of the PTO’s decision to grant
17 Defendant’s petition for cancellation of Plaintiff’s registered trademark. *Coryn*
18 *Group II, LLC v. O.C. Seacrets, Inc.*, 2011 WL 862729, at *1 (D. Md. Mar. 10,
19 2011). In doing so, the Court reasoned in part, based on FRE 401, 402, and 403,
20 that the relevance of the PTO’s decision is “limited because the standards
21 governing likelihood of confusion in registration, cancellation, or opposition
22 proceedings before the PTO can be different than the likelihood of confusion
23 standard applicable in trademark infringement actions in a district court.” *Coryn*
24 *Group*, 2011 WL 862729, at *2 (citing *Levy v. Kosher Overseers Ass’n*, 104 F.3d
25 38, 41 (2d Cir. 1997)) (quotation marks omitted).

26 The evidence sought to be excluded here is even less relevant, and less
27 compelling, than that excluded in *Coryn Group*. Here, unlike in *Coryn*, there has
28 been no PTO decision to cancel the BruxZir mark or deny its registration. There is

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1 only Keating's requests that it do so, and the PTO's administrative decision to
 2 suspend action. Moreover, the pending and incomplete PTO Proceedings will be
 3 decided upon legal standards that are different than those applied by this Court and
 4 according to precedents that are not controlling here (i.e., PTO decisions rather than
 5 Ninth Circuit law). As did the court in *Coryn*, the Court should exclude evidence
 6 of the PTO proceedings.

7 In analogous contexts, courts handling patent infringement cases commonly
 8 exclude evidence of pending patent reexamination proceedings in the PTO, on
 9 grounds that such evidence is irrelevant and has no probative value under FRE 401
 10 and 402. The PTO's decision to reexamine a patent is made after the PTO has
 11 found that a "substantial new question of patentability" has been raised as to an
 12 issued patent. 35 U.S.C. § 304; *see also Plumley v. Mockett*, 836 F. Supp. 2d 1053,
 13 1075 (C.D. Cal. 2010) (reasoning that statute requires the "PTO director to issue a
 14 reexamination order upon finding a substantial new question of patentability.")
 15 (internal quotations omitted). The PTO arrives at this decision after considering a
 16 detailed submission by the reexamination requester, including a brief and prior art.
 17 35 U.S.C. §§ 302-303. Thus, a pending reexamination is at least some evidence
 18 that a competent authority (the PTO) has questioned validity. Nevertheless,
 19 evidence of reexamination proceedings is commonly excluded as irrelevant in
 20 district court litigation involving the same patent. *See, e.g., Presidio Components,*
 21 *Inc. v. American Technical Ceramics Corp.*, 2009 WL 3822694, at *2 (S.D. Cal.
 22 Nov. 13, 2009) (granting Plaintiff's motion to exclude from trial all evidence
 23 regarding the PTO's grant of Defendant's request for reexamination because such
 24 evidence is "irrelevant to this case" and "is not probative of unpatentability.")
 25 (citing *Hoechst Celanese Corp. v. BP Chemicals Ltd.*, 78 F.3d 1575, 1584 (Fed.
 26 Cir. 1996)); *i4i Ltd. Partnership v. Microsoft Corp.*, 670 F. Supp. 2d 568, 588 (E.D.
 27 Tex. 2009) (denying Defendant's motion for a new trial on grounds that the Court
 28 erroneously excluded evidence regarding the PTO's granting of reexamination for

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1 the “simple fact that a reexamination decision . . . is not evidence probative of any
 2 element regarding any claim of invalidity.”) (citing *Procter & Gamble Co. v. Kraft*
 3 *Foods Global, Inc.*, 549 F.3d 842, 848 (Fed. Cir. 2008)); *Transamerica Life Ins.*
 4 *Co. v. Lincoln Nat. Life Ins. Co.*, 597 F. Supp. 2d 897, 904-908 (N.D. Iowa 2009)
 5 (granting Defendant’s motion *in limine* to preclude evidence of pending patent
 6 reexamination, reasoning that “evidence of incomplete patent reexamination
 7 proceedings is not admissible to prove invalidity of a patent, because it has no
 8 probative value on that issue . . .”).

9 Here, Keating’s PTO Proceedings are even less plausibly relevant than the
 10 kind of evidence excluded in these patent cases. Neither a Petition for Cancellation
 11 of a registered trademark, nor an Opposition to a trademark application, carries
 12 even a faint aroma of official action. They are actions by adversely-interested third
 13 parties, not the government. Here, they say nothing about the validity or
 14 registerability of Glidewell’s BruxZir mark, which carries a strong presumption of
 15 validity by virtue of its registration (as to dental restorations). *Zobomondo Enter.,*
 16 *LLC v. Falls Media, LLC*, 602 F.3d 1108, 1113 (9th Cir. 2010) (holding that a
 17 “federal registration . . . entitles the plaintiff to a ‘strong presumption’ that the mark
 18 is a protectable mark.”) (emphasis added); *Reno Air Racing Ass’n, Inc. v. McCord*,
 19 452 F.3d 1126, 1135 (9th Cir. 2006) (“[R]egistered marks are endowed with a
 20 strong presumption of validity . . .”). As for the PTO’s decisions to suspend
 21 proceedings, again, these actions says nothing substantive about the validity of
 22 Glidewell’s registered BruxZir mark or whether its second application for a BruxZir
 23 registration (for dental ceramics) should issue. They were purely administrative
 24 actions made to avoid duplication of efforts (by the PTO and the Court) and
 25 potential conflicted decision making between two government bodies.

26 In sum, the Court should exclude evidence and argument regarding the
 27 Petition for Cancellation, the Opposition, and other items from the related PTO
 28 Proceedings because they are irrelevant to and are not probative of any claims or

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1 defenses made by either party in this case.

2 **B. Any Probative Value of the PTO Proceedings is Substantially**
 3 **Outweighed by the Danger of Unfair Prejudice and Jury Confusion.**

4 This Court has broad discretion pursuant to FRE 403 to exclude relevant
 5 evidence “if its probative value is substantially outweighed by the danger of unfair
 6 prejudice, confusion of the issues, or misleading the jury.” Fed. R. Evid. 403;
 7 *Monotype Corp. PLC v. Int'l Typeface Corp.*, 43 F.3d 443, 449 (9th Cir. 1994)
 8 (affirming district court’s exclusion of evidence under Rule 403 because even if
 9 evidence was relevant, “it would be prejudicial and confuse the jury.”); *Lifshitz v.*
 10 *Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1432 (9th Cir. 1986)(district court’s
 11 exclusion of evidence proper where probative value of the evidence was
 12 outweighed by the considerable amount of time its admission would consume and
 13 the confusion it would cause the jury).

14 “Unfair prejudice” in the context of Rule 403 means an undue tendency to
 15 suggest decisions on an improper basis. Fed R. Evid. 403 ad. com. notes. Improper
 16 bases include unsupported inferences. *See United States v. Kaplan*, 490 F.3d 110,
 17 122 (2d Cir. 2007) (concluding that risk of unfair prejudice substantially
 18 outweighed probative value because the “jury was required to draw a series of
 19 inferences, unsupported by other evidence...”); *United States v. Ravich*, 421 F.2d
 20 1196, 1204 n.10 (2d Cir. 1970) (“The length of the chain of inferences necessary to
 21 connect the evidence with the ultimate fact to be proved necessarily lessens the
 22 probative value of the evidence, and may therefore render it more susceptible to
 23 exclusion as unduly confusing, prejudicial, or time-consuming ...”).

24 Courts have consistently found that, even if pending and incomplete PTO
 25 proceedings have some relevance, they should nonetheless be excluded pursuant to
 26 FRE 403 because they are “likely to confuse the jury and encourage a decision on
 27 an improper basis.” *Coryn Group*, 2011 WL 862729, at *2; cf. *Callaway Golf Co v.*
 28 *Achushnet Co.*, 576 F.3d 1331, 1342-1343 (Fed. Cir. 2009) (affirming lower court’s

1 decision to refuse to allow evidence of claim rejection in a parallel *inter partes*
 2 reexamination before the jury on the question of obviousness, finding that the
 3 prejudicial nature of the evidence outweighed its probative value).

4 As the *Coryn* court noted, admitting evidence of a pending PTO proceeding
 5 “will likely cause the jury to deliberate on the correctness of the previous fact
 6 finding, rather than retaining the open-minded, first impression approach to the
 7 issues our system prefers.” *Coryn Group*, 2011 WL 862729 at *2 (citing *Rambus,*
 8 *Inc. v. Infineon Techs. AG*, 222 F.R.D. 101, 110 (E.D. Va. 2004) (internal quotation
 9 marks omitted); *cf. i4i Ltd. v. Microsoft*, 670 F. Supp. 2d at 588-89 (reasoning that,
 10 even if the PTO’s decision to grant reexamination was relevant, “its probative value
 11 is substantially outweighed by its prejudicial effect in suggesting to the jury that it
 12 is entitled to ignore both the presumption of validity and the defendant’s clear and
 13 convincing burden at trial.”); *Pharmastem Therapeutics, Inc. v. Viacell, Inc.*, 2003
 14 WL 22244704, at *3 (D. Del. Sept. 30, 2003) (finding that an opinion or action
 15 from a quasi-judicial or administrative body increases the likelihood that a jury will
 16 give its conclusions deference).

17 Here, as explained above, there has not been any substantive PTO decision
 18 on the validity or registerability of the BruxZir mark, other than allowance of the
 19 registration for a class of goods. This decision is presumed to be correct, and the
 20 jury should not be invited to speculate that Keating’s Petition for Cancellation, or
 21 its Opposition, have any legal or other tendency to undermine validity or
 22 registerability.

23 In addition to the danger of confusing and misleading the jury, courts have
 24 consistently found evidence of pending PTO proceedings to be unfairly prejudicial.
 25 *Presidio Components*, 2009 WL 3822694, at *2. In *Transamerica*, a patent
 26 infringement action, the Court granted Defendant’s motion *in limine* to preclude
 27 evidence of the pending reexamination of the patent in question. Reasoning that
 28 “even if the evidence [of incomplete reexamination proceedings] has some

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1 marginal probative value, that probative value is outweighed by its potential for . . .
 2 prejudice[,]” the Court concluded that “there is simply no good purpose here for
 3 which such evidence could be offered, so that no proper limiting instruction could
 4 be given.” *Transamerica*, 597 F. Supp. 2d at 907.

5 In the instant case, even if evidence regarding the PTO Proceedings has some
 6 minimal relevance or probative value, which it does not, such evidence should
 7 nevertheless be excluded because the danger of unfair prejudice and confusion of
 8 the jury as to the issues substantially outweighs any probative value. Similar to the
 9 PTO proceedings described in the cases above, which the courts excluded from
 10 evidence for being unfairly prejudicial and confusing to the jury pursuant to FRE
 11 403, the PTO Proceedings here are in their earliest stages, incomplete, and pending
 12 in the PTO, a quasi-judicial body. Therefore, if this Court finds the PTO
 13 Proceedings to be relevant at all, it should nevertheless exclude evidence regarding
 14 them because such evidence would be unfairly prejudicial and confusing to the jury,
 15 substantially outweighing any probative value as to the issues of validity,
 16 infringement, and damages.

17 Keating’s sole purposes in admitting evidence of the PTO Proceedings would
 18 be to convey to the jury that the validity of the BruxZir mark is somehow
 19 undermined or weakened merely because Keating has sought its cancellation in the
 20 PTO. There is a substantial risk that the jury would be confused as to the legal
 21 import, if any, of Keating’s PTO filings, and will draw unwarranted inferences
 22 about the significance of these filings. In addition, or alternatively, the jury would
 23 be invited to conclude that it need not take its job seriously, because the PTO will
 24 ultimately set things right or overrule the jury’s decisions. Either outcome would be
 25 unfairly prejudicial.

26 For similar reasons, admission of the PTO Proceedings as evidence also
 27 would confuse the issues and mislead the jury. As noted above, the PTO
 28 Proceedings have no evidentiary value to the infringement and validity issues in the

1 case. Given their irrelevance, admitting evidence of the PTO Proceedings would
 2 only serve to confuse the issues and mislead the jury into focusing on collateral
 3 administrative proceedings, speculating about the legal significance of these
 4 proceedings, and possibly concluding that the PTO ultimately will overrule or
 5 correct the jury's decisions, rather than on deciding the issues based upon the jury's
 6 own assessment of the documentary and testimonial evidence.

7 **C. Evidence of the PTO Proceedings is Hearsay.**

8 Pursuant to FRE 801 and 802, this Court should exclude the Petition for
 9 Cancellation, the Opposition, and other items from the related PTO Proceedings,
 10 because they are hearsay. Hearsay is a statement that: "(1) the declarant does not
 11 make while testifying at the current trial or hearing; and (2) a party offers in
 12 evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid.
 13 801. Statements in the Petition for Cancellation, the Opposition, and other items
 14 from the related PTO Proceedings, if offered for their truth, are hearsay and they do
 15 not satisfy any of the hearsay exceptions enumerated in the Federal Rules of
 16 Evidence. The Petition for Cancellation, the Opposition, and other items from the
 17 related PTO Proceedings should be excluded from evidence on this additional
 18 ground.

19 **IV. CONCLUSION**

20 For the foregoing reasons, the Court should exclude from evidence the
 21 Petition for Cancellation, the Opposition, and all other filings and PTO actions in
 22 PTO Proceedings Nos. 91202891 and 92056050. The Court also should preclude
 23 any argument premised upon this material.

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3 Dated: January 17, 2013
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5 By: /s/Greer N. Shaw
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1 ***Glidewell Laboratories v. Keating Dental Arts, Inc.***
2 United States District Court, Central, Case No. SACV11-01309-DOC (ANx)

3 **CERTIFICATE OF SERVICE**

4 I hereby certify that on January 17, 2013, I electronically filed the document
5 described as **JAMES R. GLIDEWELL DENTAL CERAMICS, INC.'S**
6 **NOTICE OF MOTION AND MOTION IN LIMINE #5 TO EXCLUDE**
7 **EVIDENCE OF CERTAIN TRADEMARK OFFICE PROCEEDINGS;**
8 **MEMORANDUM OF POINTS AND AUTHORITIES** the Clerk of the Court
9 using the CM/ECF System which will send notification of such filing to the
10 following:

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